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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/897,105	07/03/2001	Hiroyuki Ogawa	SUD-109-DIV	1178

7590

09/09/2003

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EXAMINER

GITOMER, RALPH J

ART UNIT

PAPER NUMBER

1651

DATE MAILED: 09/09/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

# Office Action Summary

Application No.

09/897,105

Applicant(s)

Ogawa

Examiner

Ralph Gitomer

Art Unit

1651



-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

## Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136 (a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

## Status

- 1) ☒ Responsive to communication(s) filed on Apr 4, 2003
- 2a) ☐ This action is FINAL. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11; 453 O.G. 213.

## Disposition of Claims

- 4) ☒ Claim(s) 1, 2, and 7 is/are pending in the application.
- 4a) Of the above, claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1, 2, and 7 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claims \_\_\_\_\_ are subject to restriction and/or election requirement.

## Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on \_\_\_\_\_ is: a) ☐ approved b) ☐ disapproved by the Examiner.
- If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

## Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgement is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some\* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \*See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgement is made of a claim for domestic priority under 35 U.S.C. § 119(e).
- a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgement is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

## Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s). \_\_\_\_\_
- 4) ☐ Interview Summary (PTO-413) Paper No(s). \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other:

The amendment received 4/4/03 has been entered and claims 1-2, 7 are currently pending in this application. The amended title and abstract are acceptable.

5 In view of the arguments and amendments presented, the rejections of record under 35 USC 112, first and second paragraphs, are hereby withdrawn.

10 The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless -

15 (b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claim 1 is rejected under 35 U.S.C. 102(b) as being anticipated by Turner.

20 Turner (4,945,060) entitled ~~Device~~ Device for Detecting Microorganisms teaches in column 3 lines 45-53, a container with an indicator medium sensor is separated from the specimen and its growth medium by a membrane that permits the passage of gas molecules but prevents the passage of ions, to detect  
25 microorganisms. In column 4 lines 19-29, the gas permeable, ion impermeable membrane is described. Microbial growth can be detected by detecting carbon dioxide. See the claims.

5 (e) the invention was described in a patent granted on an application for patent by another filed in the United States before the invention thereof by the applicant for patent, or on an international application by another who has fulfilled the requirements of paragraphs (1), (2), and (4) of section 371(c) of this title before the invention thereof by the applicant for patent.

10 The changes made to 35 U.S.C. 102(e) by the American Inventors Protection Act of 1999 (AIPA) do not apply to the examination of this application as the application being examined was not (1) filed on or after November 29, 2000, or (2) voluntarily published under 35 U.S.C. 122(b). Therefore, this application is examined under 35 U.S.C. 102(e) prior to the amendment by the AIPA (pre-AIPA 35 U.S.C. 102(e)).

15 Claim 1 is rejected under 35 U.S.C. 102(e) as being anticipated by DiGuseppi.

DiGuseppi (5,858,769) entitled ~~Device~~ Device for Detecting Microorganisms~~with~~ with a 102(e) date of 5/1989, teaches in column 5 lines 28-43, a sensor with a membrane attached to a support medium inside a container which is sealed. The membrane permits the passage of gas but prevents passage of ions. See the claim.

Applicant's arguments filed 4/4/2003 have been fully considered but they are not persuasive.

25 Applicant argues that the references do not teach what the state of the sensor material is.

It is the examiner's position that Turner states in column 4 lines 41-45, the only limitations on the selection of indicators are the requirements that they have acceptable dynamic pH ranges and wavelength changes that are readily detectable by existing technologies. See claim 1 of DiGuisseppi which does not limit the state of the indicator. No criticality is seen in the state of the indicator.

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 2 and 7 are rejected under 35 U.S.C. 103(a) as being unpatentable over each of Turner and DiGuisseppi.

Three claims are presented, the first directed to detecting the presence of microorganisms with a fluid indicator, the second directed to a method for identifying quantities of microorganisms with a fluid indicator, the third (7) directed to identifying quantities of microorganisms with any state indicator.

See the teachings of the references above.

The claims differ from each of the references in that the claims are directed to a quantitative determination whereas the references are directed to detecting microorganisms. Further the references do not specifically state the indicator state.

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It would have been obvious to one of ordinary skill in the art at the time the invention was made to employ the methods of the references to quantitatively determine microorganisms because they discuss amounts of microorganisms that are detectable qualitatively and present curves to relate the microorganisms to the amount of change in indicator. Minimum amounts of microorganisms detectable are discussed. This would have rendered obvious quantitative determination in view of the curves presented that show growth rates of microorganisms.

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Any inquiry concerning this communication or earlier communications from the examiner should be directed to Ralph Gitomer whose telephone number is (703) 308-0732. The examiner can normally be reached on Tuesday-Friday from 8:00 am - 5:00 pm. The examiner can also be reached on alternate Mondays. If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Michael Wityshyn can be reached on (703) 308-4743. The fax phone number for this Art Unit is (703) 872-9306. Any inquiry of a general nature or relating to the status of this application should be directed to the Group receptionist


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Art Unit 1651

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whose telephone number is (703) 308-1235. For 24 hour access to  
patent application information 7 days per week, or for filing  
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Center for more information.



Ralph Gitomer  
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